Supreme Court, U.S.
FILED
MAY 2 2001
OFFICE OF THE CLERK

(2)

No. 00-1413

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

GREGORY S. COLEMAN
Solicitor General

JULIE CARUTHERS PARSLEY
Deputy Solicitor General
Counsel of Record

WILLIAM R. THOMPSON, II
Assistant Solicitor General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

ATTORNEYS FOR RESPONDENT

17pp

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of Facts 2

Summary of the Argument 5

Argument 6

I. The Tribe Has Presented No Reason for This Court to Exercise Its Discretion and Review This Case. 6

II. The Restoration Act Expressly Abrogates the Tribe's Immunity from Suit. 6

III. The Tribe's Interpretation of §1300g-6 and §1300g-4(f) Is Unreasonable. 8

IV. The Capacity-to-Sue Arguments Are Not Properly Before the Court. 11

Conclusion 12

TABLE OF AUTHORITIES

CASES

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 9, 10

Kiowa Tribe v. Mfg. Techs., Inc.,
523 U.S. 751 (1998) 6

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 10

Puyallup Tribe v. Dep't of Game of Wash.,
433 U.S. 165 (1977) 12

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 6, 12

Texas v. Ysleta del Sur Pueblo,
79 F.Supp.2d 708 (W.D. Tex. 1999) 4

Texas v. Ysleta del Sur Pueblo, No. 00-50014
(CA5 Oct. 31, 2000) 2

TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676
(CA5 1999) 8

Ysleta del Sur Pueblo v. Texas,
36 F.3d 1325 (CA5 1994) 2, 3, 6-8, 10

STATUTORY AND CONSTITUTIONAL PROVISIONS

25 U.S.C. §1300g 2

25 U.S.C. §1300g(1) 10

25 U.S.C. §1300g-4(f) 8-10

25 U.S.C. §1300g-6 ..... 4, 6, 8-12
25 U.S.C. §1300g-6(a) 2-3, 8, 9
25 U.S.C. §1300g-6(c) 3, 8, 10
28 U.S.C. §1291 12
TEX. CIV. PRAC. & REM. CODE §125.001 11
TEX. CIV. PRAC. & REM. CODE §125.001(a)(1) 4
TEX. CIV. PRAC. & REM. CODE §125.002 11
TEX. CIV. PRAC. & REM. CODE §125.002(a) 4
TEX. CIV. PRAC. & REM. CODE §125.021(1) 4
TEX. CONST. art 3, §47(a) 9
TEX. PEN. CODE §47.01 ..... 4, 9
TEX. PEN. CODE §47.02 4
TEX. PEN. CODE §47.03 4
TEX. PEN. CODE §47.04 4
TEX. PEN. CODE §47.06 4

RULES

FED. R. CIV. P. 17(b) 11
SUP. CT. R. 10(a) 6
SUP. CT. R. 10(c) 6
SUP. CT. R. 15(2) 4

No. 00-1413

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to the petition for writ of certiorari filed by the Ysleta del Sur Pueblo Indian Tribe, the Tigua Gaming Agency, the Tigua Tribal Council, Acting Tribal Governor Filbert Candelaria, and Gaming Commissioner Francisco Hernandez (collectively "the Tribe"). The Fifth Circuit resolved this case with a straightforward application of the canons of statutory construction, and the case does not warrant the Court's review.

In 1999, the State sued the Tribe in federal court, seeking to enjoin illegal gambling operations at the Tribe's Speaking Rock Casino in El Paso, Texas. In response, the Tribe filed a motion to dismiss for lack of jurisdiction based on its tribal immunity from suit. In an unpublished, *per curiam* opinion, the Fifth Circuit affirmed the district court's determination

that Congress unequivocally abrogated and the Tribe clearly waived its immunity as part of "the bargain struck between the Tribe, the State of Texas, and Congress in the passage of the Restoration Act." *Texas v. Ysleta del Sur Pueblo*, No. 00-50014 (CA5 Oct. 31, 2000) (per curiam); *see* 25 U.S.C. §1300g; *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1327-29 (CA5 1994) (*Ysleta I*).

STATEMENT OF FACTS

In August of 1987, Congress granted federal tribal status to the Ysleta del Sur Pueblo by passing the Restoration of Federal Supervision Act (the "Restoration Act"). *See* 25 U.S.C. §1300g. Before enactment of the Restoration Act, however, various Texas state officials were concerned that the Act did not protect against the Tribe running "high stakes" gaming operations on the reservation. In exchange for passage of the Restoration Act, the Tribe adopted Tribal Resolution No. T.C.-02-86, stating that the Tribe had "no interest in conducting high stakes bingo or other gambling operations on its reservation," and that the Tribe "remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation." *See Ysleta I*, 36 F.3d at 1328 n.2; *id.* at 1327-30 (recounting the legislative history of the Act, including the Tribe's accommodations and promises made in order to secure passage of the Act).

In accordance with the Tribe's resolution, Congress enacted §1300g-6(a) of the Restoration Act, prohibiting gaming activities on the reservation that are prohibited by Texas law:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on

> the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.

25 U.S.C. §1300g-6(a). Thus, under §1300g-6(a), Texas gaming laws operate as surrogate federal law with respect to gaming on the Tribe's reservation. Accordingly, the Restoration Act—not the Indian Gaming Regulatory Act (IGRA)—governs gambling on this reservation. *See Ysleta I*, 36 F.3d at 1335. In addition, Congress authorized the State to enforce §1300g-6(a) and bring suit in federal court to enjoin any gaming violation by the Tribe:

> [T]he courts of the United Sates shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

25 U.S.C. §1300g-6(c).

Despite its commitments in the tribal resolution and the bargain struck with the State and Congress, the Tribe opened the Speaking Rock Casino on its reservation in El Paso County, Texas, in 1993. App. 10a. The casino operates high stakes gambling, including poker, bingo, keno, slot machines, and blackjack. R.97-100. These games are prohibited by the

Texas Penal Code and the public policy of the State. *See* TEX. PEN. CODE §§47.01-.04, .06.

In September 1999, the State filed suit to enjoin the Tribe from operating the casino in violation of Texas and federal law. R.1-16. The Tribe filed a motion to dismiss, arguing that it retained tribal immunity from suit. The Tribe also argued that the Attorney General lacked the capacity to sue the Tribe. R.17-28. The district court denied the motion to dismiss but ordered the State to amend its pleading to include a statute specifically granting the Attorney General authority to bring a claim to enjoin gaming activities. R.81-93; App. 14a-18a. The State then filed an amended complaint, identifying the Attorney General's authority to enjoin common nuisances such as "gambling in violation of the Penal Code" under the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §125.001(a)(1), .002(a), .021(1); R.94-107.

The Tribe filed a second motion to dismiss, and the district court overruled the motion, concluding §1300g-6 is an unambiguous waiver of the Tribe's immunity. *See Texas v. Ysleta del Sur Pueblo*, 79 F.Supp.2d 708, 711 (W.D. Tex. 1999). The Fifth Circuit affirmed. App. 3a-5a.[1]

---

1. The Tribe's suggestion that the State approved of Class II gaming and "offered to negotiate a contract for Class III lottery and pari-mutuel racing," Pet. at 4, is not relevant to the issue presented to the Court and is not supported by the record on appeal. *See* SUP. CT. R. 15(2).

SUMMARY OF THE ARGUMENT

In return for designation as a federally recognized Indian tribe, the Tribe agreed to congressional abrogation of its tribal immunity for violations of Texas gaming laws. The Speaking Rock Casino now operates in violation of Texas gaming laws, and the Restoration Act permits the State to maintain this action to enjoin the illegal activity. Unwilling to live up to the agreement it made with Congress and the State of Texas, the Tribe strives to make unclear what is perfectly clear—the Restoration Act controls this case and unambiguously waives the Tribe's immunity.

The Tribe has no logical argument to explain why the clear language of the Restoration Act does not do exactly what it says. Their only rebuttal is that a general statutory grant controls over a specific statutory grant—an incorrect statement of the canons of statutory construction that, even if correct, would not achieve their hoped-for result. Additionally, the Tribe's convoluted argument that the Texas Attorney General lacks the capacity to bring this suit is (1) not properly before this Court and (2) incorrect.

The Restoration Act is plain. The State may seek injunctive relief against gaming activities that violate Texas law. That is precisely what the State is attempting to do through this action. Not only was the Fifth Circuit correct in its resolution of this case, but the Tribe has given the Court no compelling reason to exercise its discretion and grant review of this case. Certiorari should be denied.

ARGUMENT

I. THE TRIBE HAS PRESENTED NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION AND REVIEW THIS CASE.

The Tribe has presented no compelling reason to grant the petition for writ of certiorari. The Fifth Circuit's decision neither conflicts with decisions of other state or federal courts, nor does it decide an important question of federal law that should be decided by the Court. *See* SUP. CT. R. 10(a), (c). In fact, unlike the provisions of the IGRA, §1300g-6 of the Restoration Act only applies to one tribe—the Ysleta del Sur Pueblo. This case would have very little, if any, precedential value beyond the litigants in this unusual case. The Court should not exercise its extraordinary, discretionary review.

II. THE RESTORATION ACT EXPRESSLY ABROGATES THE TRIBE'S IMMUNITY FROM SUIT.

Suits against Indian tribes are barred in the absence of a clear waiver of immunity by the tribe or congressional abrogation of tribal immunity. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). The Tribe contends that §1300g-6 of the Restoration Act is not an express waiver of its immunity. However, in enacting §1300g-6, Congress unambiguously abrogated the Tribe's immunity from suits brought by the State to enjoin illegal gaming activities by the Tribe. *See Ysleta I*, 36 F.3d at 1333.

As the Fifth Circuit explained, the history of the "bargain struck between the Tribe, the State of Texas and Congress in the passage of the Restoration Act" explains why Congress

expressly abrogated the Tribe's immunity. In 1985, when the Tribe sought passage of a bill to restore its federal trust status, the Texas congressional delegation initially raised concerns that the bill as then drafted would permit high stakes gambling operations otherwise banned under Texas law. *See id.* at 1327.

In response, the Tribe approved Tribal Resolution No. TC-02-86. *Id.* at 1327-28. The Resolution provided that the Tribe "had no interest in conducting high stakes bingo or other gambling operations on its reservation, *regardless of whether such activities would be governed by tribal law, state law or federal law*." *See id.* at 1328 n.2 (emphasis added). Although the Tribe found application of state laws on the Tribe's reservation "to be wholly unsatisfactory," "a substantial infringement upon the Tribes' power of self government," and a "singling out [of] the Texas Tribes for treatment different than that accorded other Tribes in the country," the Tribe firmly "believed that the controversy over gaming must not be permitted to jeopardize this important legislation." *Id.* Therefore, to assuage these concerns and clear the way to obtaining tribal status, the Tribe asked the Texas congressional delegation to amend the Restoration Act to include "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." *Id.* at 1328-29 & n.2.

Congress granted the Tribe's request. Tracking the text of the tribal resolution, the Restoration Act provides that "all gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands

of the tribe." 25 U.S.C. §1300g-6(a). Congress explicitly abrogated the Tribe's sovereign immunity to suit in federal court brought by the State to enjoin violations of Texas's gambling laws. *See* 25 U.S.C. §1300g-6(c). The clear language of the statute expressly gives the State the right to bring this lawsuit.

III. THE TRIBE'S INTERPRETATION OF §1300g-6 AND §1300g-4(f) IS UNREASONABLE.

The Tribe suggests that Congress enacted the Restoration Act as a statute generally applicable to the Tribe—like Public Law 280—without using the definitive language necessary to show congressional intent to abolish the Tribe's immunity or to subject the Tribe to suit under the Act. *See* Pet. at 3, 7-8.

In particular, the Tribe claims §1300g-6 is fairly susceptible to an alternative interpretation, based in part on §1300g-4(f), that avoids the conclusion that Congress intended to waive tribal immunity. Section 1300g-4(f) provides:

> The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 . . . .

25 U.S.C. §1300g-4(f). Under this subsection, the State exercises limited civil and criminal jurisdiction similar to the authority conferred on certain other states under Public Law 280. *See TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 685 (CA5 1999). According to the Tribe, Congress enacted §1300g-6 as a *limitation* on the civil jurisdiction granted in

§1300g-4(f) with respect to gaming activities. *See* Pet. at 3. Thus, the Tribe concludes that §1300g-6 is necessarily lesser than the grant of civil jurisdiction under Public Law 280. Because the Tribe believes that Public Law 280 would not confer jurisdiction over its gaming activity, the Tribe argues that the lesser jurisdiction conferred to the State in §1300g-6 could not confer jurisdiction over the Tribe's gaming activity. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208-09 (1987).[2] According to the Tribe, Congress only enacted §1300g-6 to permit the State to seek injunctive relief against tribes (other than the Ysleta del Sur Pueblo) "over whom the state would have had jurisdiction under section 1300g-4(f) if Congress had not preempted such jurisdiction under section 1300g-6(a)." Pet. at 8. The Tribe concludes that, given this "reasonable interpretation," §1300g-6 cannot be interpreted as an unambiguous waiver of tribal immunity.

However, the Tribe's tortured interpretation of the Restoration Act is wholly unreasonable. First, it is absurd to

---

2. Even if the *Cabazon Band* test from Public Law 280 applied in this case (and it does not), the Tribe's gaming activities would nevertheless be prohibited under Public Law 280 because they violate the public policy of Texas. Unlike the bingo regulated by California in *Cabazon Band*, Chapter 47 of the Texas Penal Code and the public policy of Texas clearly prohibit the casino-style gaming conducted by the Tribe on the reservation. *See* TEX. PEN. CODE §47.01, *et seq.*; TEX. CONST. art 3, §47(a). This case involves statutes that are "criminal in nature" (as well as conduct that violates the law and public policy of Texas) and thus Texas law would be fully applicable to the Tribe even under Public Law 280. *See Cabazon Band*, 480 U.S. at 208-09. The Public Law 280-*Cabazon Band* argument is a red herring.

suggest that Congress enacted §1300g-6 to permit the State to seek injunctive relief in federal court against tribes *other than* the Ysleta del Sur Pueblo. Section 1300g-6 is codified in the subchapter entitled "Ysleta del Sur Pueblo: Restoration of Federal Supervision," and the term "tribe" is expressly defined as "the Ysleta del Sur Pueblo." 25 U.S.C. §1300g(1). Indeed, the opposite is true. Section 1300g-6(c) only grants the State the authority to seek relief in federal court for illegal gaming operations by the Ysleta del Sur Pueblo—not any other tribe.

Moreover, it is a canon of statutory construction that specific provisions govern over general provisions. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The Tribe's alternative interpretation stands this principle on its head. Indeed, the Tribe bases its entire argument on the erroneous premise that the general grant of civil and criminal jurisdiction in §1300g-4(f) limits the express provision regarding the Tribe's gaming activity in §1300g-6. Under the well-established rules of statutory construction, §1300g-6 grants the State the right to seek injunctive relief in federal court for illegal gaming activity by the Tribe, and §1300g-4(f) defines the State's authority to assert its general civil and criminal jurisdiction over the Tribe and members of the Tribe in all other circumstances. The Tribe's "§1300g-6 limitation" argument is flat wrong.

In reality, the Tribe simply renews its past attempts to bootstrap the *Cabazon Band* test from Public Law 280 into Restoration Act cases. However, as the Fifth Circuit properly concluded in *Ysleta I*, "Congress did not enact the Restoration Act with an eye towards *Cabazon Band*." *See Ysleta I*, 36 F.3d at 1334.

IV. THE CAPACITY-TO-SUE ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT.

Under its alternative, conditional-abrogation theory, the Tribe contends that even if §1300g-6 is an express wavier of tribal immunity, the waiver must be strictly construed. Even though the Tribe recognizes that the "Fifth Circuit did not address the conditional-abrogation theory," Pet. at 7, the Tribe claims the Texas Legislature—not the Attorney General of Texas—is the only party specifically authorized to invoke the waiver. *See* Pet at 11-12. In addition, the Tribe claims the State's reliance on §125.001 and §125.002 of the Civil Practice and Remedies Code—authorizing the Attorney General to sue to enjoin public nuisances such as gambling—is an independent state law claim against the Tribe in violation of the limited waiver in §1300g-6. *See* Pet. at 13.

In reality, the Tribe simply confuses the question of whether the Attorney General has the *capacity to sue* the Tribe on behalf of the State with the question of whether Congress waived the Tribe's immunity in the Restoration Act. The question of whether the Attorney General has the capacity to sue is a state law question, *see* FED. R. CIV. P. 17(b); the waiver of immunity inquiry is a jurisdictional question governed by federal law.

In this case, the Fifth Circuit concluded §1300g-6 expressly abrogated the Tribe's immunity from suit by the State to seek to enjoin illegal gaming activity. As the Fifth Circuit properly recognized, however, the capacity-to-sue issue is not entitled to immediate appellate review under the collateral order doctrine because capacity-to-sue issues are

routinely reviewed on appeal from final judgment.[3] Thus, the Fifth Circuit properly abstained from ruling on these issues, and the Court cannot review the issues on petition for certiorari.[4]

CONCLUSION

For the reasons stated, Respondent respectfully requests that the Tribe's petition for writ of certiorari be denied.

---

3. Recognizing that the capacity-to-sue issue was not immediately appealable, the Tribe petitioned the district court to certify the issue of capacity for appeal under 28 U.S.C. §1291. R.121. The Court denied the request. R.143-44.

4. On appeal, the State alternatively argued that, even if Congress did not expressly waive tribal immunity in §1300g-6, tribal immunity did not bar the State's claim for prospective injunctive relief against tribal officials for violations of State gaming laws that were adopted by Congress in the Restoration Act as a surrogate for federal law under the *Ex parte Young* doctrine. *See Santa Clara Pueblo*, 436 U.S. at 59; *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165, 171 (1977). Howewer, the Fifth Circuit did not reach this argument.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

GREGORY S. COLEMAN
Solicitor General

JULIE CARUTHERS PARSLEY
Deputy Solicitor General
Counsel of Record

WILLIAM R. THOMPSON, II
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR RESPONDENT